

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
PEPPER, et al., : Docket #21cv6581
:
Plaintiffs, :
- against - :
FLUENT, INC., et al., : New York, New York
: January 16, 2024
Defendants. :
----- :

PROCEEDINGS BEFORE
THE HONORABLE BARBARA C. MOSES,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For Plaintiffs: THE WEITZ FIRM, LLC
BY: MAX MORGAN, ESQ.
1515 Market Street, Suite 1100
Philadelphia, Pennsylvania 19102

ZIMMERMAN LAW OFFICES, P.C.
BY: JEFF BLAKE, ESQ.
77 West Washington Street, Suite 1220
Chicago, Illinois 60602

For Defendants: SHEPPARD MULLIN
BY: JAY RAMSEY, ESQ.
1901 Avenue of the Stars, Suite 1600
Los Angeles, California 90067

Transcription Service: Carole Ludwig, *Transcription Services*
155 East Fourth Street #3C
New York, New York 10009
Phone: (212) 420-0771
Email: Transcription420@aol.com

Proceedings conducted telephonically and recorded by
electronic sound recording;
Transcript produced by transcription service.

INDEXE X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
----------------	---------------	--------------	-----------------------	----------------------

None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
---------------------------	--------------------	-----------	-----------	----------------------

None

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

3

THE CLERK: Cody Pepper, et al. v. Fluent, Inc.,
case number 21cv6581. Counsel, please make your
appearances for the record, starting with counsel for
plaintiffs

MR. MAX MORGAN: Good morning, Your Honor, Max
Morgan on behalf of plaintiffs.

MR. JAY RAMSEY: Good morning, Your Honor, it's
(indiscernible) for the defendants.

THE COURT: Okay, Mr. Morgan for the plaintiffs,
Mr. Ramsey for the defendants. And how about you, Mr.
Blake?

MR. JEFF BLAKE: Good morning, Your Honor, Mr.
Blake for the plaintiffs.

THE COURT: Also for the plaintiffs. Okay, who
between counsel who is presenting on today's essentially
motion to compel or possibly motion for sanctions? I'm
not sure this is a 37(a) or 37(b) motion, but one you is
going to tell me.

MR. MORGAN: Your Honor, I'll be speaking today.
The matter before Your Honor is for a contempt for
failure to comply with the Court's previous order on the
motion to compel that we filed a month or two back.

THE COURT: Well, there are two pieces, as I
understand it, to today's motion, one of which you just

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

4

mentioned is a, can only be a 37(b) motion with respect to my last court order. Let me put that on the back shelf for just a minute and deal with what may be the simpler motion. You also want a particular defendant for deposition, correct?

MR. MORGAN: There are - yes, Your Honor, there's a few things. So in our letter we requested there's an individual that's referenced in the FTC documents. We'd like to know their identity. We've requested it because we'd like to take that person's deposition. The defendants refused to provide that individual's identity or provide a deposition date.

There are also, intermingling with the Court's prior issue, the individuals that have been identified as past employees. The defendant was supposed to provide with their last known contact information. We discussed with defense counsel whether they would accept subpoenas and whether or not they'd be representing them. We have not received a definitive answer. So if they are not going to be accepting the subpoenas and representing these individuals, we would like their contact information so we can move forward with depositions.

THE COURT: All right, well, as to Mr. or Ms. Executives listed in the FTC complaint, isn't that, don't

1

PROCEEDINGS

5

2 we already have a rule for dealing with that and isn't it
3 Rule 30? Can't you just send the deposition notice and
4 identify your proposed witness with reference to the FTC
5 complaint since you don't know the name yet?

6

MR. MORGAN: We are happy to do so, Your Honor.
7 We think though we'll likely be back before Your Honor if
8 that is the case. Trying to short circuit things and,
9 you know, try to get a schedule worked out with
10 everybody, but we're happy to do that.

11

THE COURT: Well, I'm afraid you didn't really
12 short circuit things because you wrote me all these
13 letters about it instead of simply sending off the notice
14 which would've teed it up. With respect to the folks
15 whose names you do know, correct, but who you need to
16 subpoena because the defendants tell you they don't work
17 there anymore and you don't know where they are?

18

MR. MORGAN: Yes, Your Honor.

19

THE COURT: Let me hear briefly from Mr. Ramsey
20 on that. We don't want to waste time here with
21 shenanigans. Mr. Ramsey, normally in a situation like
22 this, if the corporation's attorney is not willing to
23 accept service of the subpoena, which happens sometimes,
24 I simply direct you to produce the contact information.
25 Why should I not do that here?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

6

MR. RAMSEY: Yes, Your Honor. So we already told the other side that we're going to be representing three non, non-lawyers, former employees, excuse me --

THE COURT: Non-lawyers and former employees.

MR. RAMSEY: Non-lawyers as well.

THE COURT: And give me their last names please just so I can follow along here at home/

MR. RAMSEY: Ey yi yi.

THE COURT: Somebody give me --

(interposing)

MR. RAMSEY: I wasn't prepared for that. I could get them for you.

THE COURT: This is why I make people come into the courtroom. You're always better prepared if I make you pack up your briefcase and come on in.

MR. RAMSEY: I will find those names for you in a moment.

MR. MORGAN: I can give them to you, Your Honor.

THE COURT: Hold on, hold on, I think that Mr. Morgan can give them to me.

MR. MORGAN: All right, so the three individuals that were identified as non-employees are Stephanie Crouch, C-R-O-U-C-H --

THE COURT: Thank you.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

7

MR. MORGAN: -- and - I'm sorry?

THE COURT: Go ahead.

MR. MORGAN: Hannah, H-A-N-N-A-H, Park, P-A-R-K.
And Mohit Singla, that's M-O-H-I-T, last name S-I-N-G-L-A.

THE COURT: Okay. So Crouch, Park, and Singla.
Mr. Ramsey.

MR. RAMSEY: Yeah, so we told them that we would
be representing them and could accept service of the
subpoena. The issue was whether we would then be moving
for a protective order, and I sent an email to meet and
confer about that and then never got either a subpoena or
a response to the meet and confer.

THE COURT: Protective order for what purpose?

MR. RAMSEY: There's a - I know we're getting to
it at the end, but there is a I think foundational issue
that they're going after the former employees first. You
know, they can do what they want. They haven't taken a
30(b)(6). They have - I don't even know what they're
going to ask them about yet because, as we discussed last
time, we had - they don't even know who yet sent any of
the messages. And I understand, you know, and I would
like to discuss this with them because I don't think it
makes sense to bother a former employee before we even

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

8

know anything about the case. Now, again --

THE COURT: I'm not --

(interposing)

MR. RAMSEY: -- they can do what they want --

THE COURT: I'm not hearing the grounds for a protective order in there. I'm just not.

MR. RAMSEY: I know, but I --

(interposing)

THE COURT: You know - Mr. Ramsey --

(interposing)

THE COURT: -- Mr. Ramsey, you know the deposition rules, you know the definition of relevance under Rule 26(b). I expect and you can expect opposing counsel to adhere to that. If in the event you feel that they are asking irrelevant questions, as you know, this is also in Rule 30, you cannot instruct on that basis, but if they're completely out of line, you have other remedies including seeking a protective order. Generally speaking, you cannot, however, run to court for a protective order because you think in a deposition that hasn't happened yet they might ask irrelevant questions. That's just not the way the rules work.

Now, that said, if they are playing games with you, which you suspect, if plaintiffs' counsel are

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

9

deliberately keeping you in the dark about what they're going to ask these folks about, that could very well result in an unhelpful description, unhelpful in several respects. First, because most of the transcript is going to end up people objecting and arguing with each other, and unhelpful in a second respect, namely, if you're representing these folks and they won't tell you what the subject of the deposition is, then you won't be able to prepare them very well, and we'll have a whole lot of I don't know, I don't remember. Gee, I'd have to refresh my recollection with stuff I don't have with me, particularly in the case of ex-employees.

So I'm not - let me just be clear, plaintiffs, I'm not endorsing this approach if, indeed, it is the approach you're taking, but as you say, Mr. Ramsey, generally speaking, each side gets to determine for itself the order in which it wishes to take depositions. And for parties' depositions, which these effectively are, they're not required to clear the subjects with you in advance.

MR. RAMSEY: I agree. I just was hoping to discuss all of that with the other side before we got to this point and having had --

THE COURT: Well, I think that it would be good

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

10

--

(interposing)

THE COURT: I think that's a good hope, but you can't hold out on the contact information while you're hoping --

MR. RAMSEY: Well, I did --

THE COURT: Hold on --

(interposing)

MR. RAMSEY: -- accept service.

THE COURT: You will either accept service by the end of this week, Friday, or provide more recent contact information by the end of this week. You may, of course, simultaneously negotiate or attempt to negotiate over what these folks are going to be asked about. They're going to have to talk to you anyway just about logistics, right, time and place. So, Mr. Morgan, I suggest that you have at least a little bit of a conversation about what these folks are in for once you get them under oath. Let's not - let's not violate Rule 1 here. That's the part about being cooperative --

MR. MORGAN: Certainly, Your Honor --

THE COURT: -- before we even get started with depositions.

And really the same goes to you, Mr. Ramsey, for

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

11

the executive named in the FTC complaint. You can hold out and say send me a Rule 30 subpoena, excuse me, send me a Rule 30 deposition notice describing this individual rather than naming this individual or you can just give them the name which they're going to find out anyway once the fellow is sitting in front of them under oath. So let's try to keep that sort of thing to a minimum, gentlemen.

Now, can we talk about documents?

MR. RAMSEY: Yes, Your Honor.

THE COURT: All right, so, Mr. Morgan, I issued an order saying that the defendants have to produce to you documents previously produced to the FTC if and to the extent that those documents concern unwanted text messages. That was language that the defendants proposed at the last hearing, and now we know why. Now they say, wait a minute, that's not really what the FTC complaint was about. The FTC was interested in the content of these messages not on whether they were wanted or unwanted. And you say, well, a lot of the messages that we're complaining about in our complaint are the same messages or very similar messages that the FTC was complaining about in its complaint. True. But you're complaining about them for different reasons.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

12

Here, you're complaining that these messages never should've been sent in the first place regardless of their content, misleading or otherwise, whereas the FTC is content concerned, content focused primarily. So we sort of have a philosophical question here. Why should I not agree with the defendants that this is just not what the FTC was after?

MR. MORGAN: So, Your Honor, to start, I think really the resolution of this is as simple as looking at count 5 of the FTC complaint, which was for assisting and facilitating violations of the telemarketing sales rule, which is a law that's very similar to the TCPA, you know, prohibits sending, you know, spam messages, right, unwanted calls and text messages.

So I do think that the FTC complaint did obviously go beyond just the narrow of issue of sending unwanted text messages or, you know, making unwanted calls, but it's certainly, while it also discussed the content of the messages, it certainly at various points, you know, certainly also addressed the unsolicited nature of these types of messages.

So, you know, I think to just say, hey, that's totally off base, then investigate us for unsolicited messages at all I think is just wrong. And, secondly,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

13

you know, the information in this, we believe the information in the FTC complaint is certainly relevant because we're trying to figure out, you know, which companies were responsible as the publishers for Fluent that sent the messages.

(interposing)

THE COURT: What does the TRS say, what does the telemarketing sales rule, 16 C.F.R. § 310.4(b)(1)(B), what does it actually say?

MR. MORGAN: I can pull it up if you could --

THE COURT: I knew you could. I had confidence.

MR. MORGAN: So 310.4 is titled Abusive Telemarketing Acts or Practices, and you asked for --

THE COURT: 310.4(b)(1)(v).

MR. MORGAN: So (b)(1) is Pattern of Calls. It is an abusive telemarketing act or practice and a violation of this rule for a telemarketer to engage in or for a seller to cause a telemarketer to engage in the following conduct, and it was - it was .4?

THE COURT: 5.

MR. MORGAN: 5, initiating any outbound telephone call that delivers a prerecorded message other than a prerecorded message permitted for complaint with a call, abandonment, and safe harbor. So that is calls --

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

14

THE COURT: So that's telephone calls not texts.

MR. MORGAN: Prerecorded calls.

MR. BLAKE: Your Honor, this is Jeff Blake for
the plaintiffs. I would also point out that the --

(interposing)

THE COURT: Sorry, Mr. Blake, we don't do, this
is not tag team here. That's why I asked whose motion
this is. Generally speaking, it's one lawyer per side
per motion; otherwise it's just chaos. Sorry about that.

MR. BLAKE: I apologize.

THE COURT: I have great confidence in your
colleague Mr. Morgan.

MR. MORGAN: I think (b)(1)(iii) is initiated an
outbound telephone call to a person. In the TSR I must
admit it's not an area that I practice in frequently, but
I know under the TCPA a telephone call, the FTC has
expanded that language to include text messages. I would
suspect that there is something very similar to that as
well under the TSR.

THE COURT: But not what the FTC was going for
apparently in this particular case.

MR. MORGAN: I am not - I mean I do know that
the TSR does regulate calls and text messages. I think
it was certainly applicable. I think the defendant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

15

obviously would know better than us. I just want to look at one other paragraph. I lost my place.

(pause in proceeding)

THE COURT: So let me ask a broader question, sort of a philosophical question. I don't read the administrative complaint, the FTC's complaint to focus on the same issue that you're focusing on here, that folks are getting text messages that they did not consent to receive from folks you believe were agents of or in some way working in cahoots with the defendants that you sued.

The FTC was concerned about consent, however, from a slightly different angle. If you look at the very beginning of their complaint, paragraph 2, the FTC charges the defendants have operated a message consent arm enterprise using deceptive ads to obtain consent that the consumers didn't really intend to give or didn't realize they were being asked to give or didn't realize the breadth of the consent that they were purportedly giving when they clicked on this blue button or that red button or whatever it is that they clicked on.

So I guess let me turn to defendants' counsel at this point because you are the one who suggested that restrictive language to me and ask you in a sense isn't the entire FTC complaint concerned with unwanted

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

16

solicitations in that the FTC charges you and others with obtaining purported consent that wasn't true consent in a misleading manner?

MR. RAMSEY: Sure, so just quickly on counts 5, if you look at the actual text of the complaint itself, it's about prerecorded phone calls --

THE COURT: Got it.

MR. RAMSEY: -- specific allegations. As for your question, in paragraph 2, so the other thing we discussed at the hearing last time is that the FTC complaint was focused on what happens once consumers land on Fluent's website. And so let me back up a little bit. There to me is a dividing line which is they, individuals get to Fluent's website somehow. They see an ad on Facebook, they see an ad on the internet. In this case they allegedly get a text, whatever it is, they get to the website. Fluent then has various surveys and different things and collects information and with that information gets consent under the --

THE COURT: You have other people solicit them for other things.

MR. RAMSEY: Correct. So then we sell that information to, I think I vaguely remember, all I could think of last time was like a toothpaste brand but

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

17

whatever it is, right, we sell it to some other company that wants to market itself, and they reach out --

THE COURT: And apparently personal injury attorneys too. Sorry, I spent some time with the FTC complaint over the weekend.

MR. RAMSEY: And so the allegations about the consent arm go to Fluent's website and its attempt or, in the way of the FTC's way of viewing it, alleged attempts to get consent for those other companies or advertisers or whatever you might want, marketing partners to then contact people. Certainly, the case is about whether the consent that people provide on Fluent's website for calls from these other companies that were certainly at issue all over the place in FTC - and from multiple respects. One is are you attracting people to your website with an advertisement that promises a reward or a chance to win something without actually providing it. So, you know, are you pulling people to the website with an ad that's misleading. And then it was all about, well, are your consent practices on the website sufficient, are the fonts big enough, do you make them click a box, do you have --

THE COURT: Can they see the small print on their phones, they're only on their laptops --

1 PROCEEDINGS 18

2 MR. RAMSEY: Correct.

3 THE COURT: Right.

4 MR. RAMSEY: And so definitely about that.

5 THE COURT: So when I look at --

6 MR. RAMSEY: But to me that's not what this is
7 about.

8 THE COURT: Sorry about that. When I look at,
9 for example, the allegations that the FTC makes beginning
10 at paragraph 98 of the complaint, which is on page 27, it
11 describes your allegedly false and misleading
12 (indiscernible) websites, and they allege, for example,
13 at paragraph 100 that you tricked consumers into clicking
14 check boxes and then treat that as blanket consent for
15 receiving telemarketing solicitations from lots and lots
16 and lots, dozens or even hundreds, they say, of third
17 parties and that these purported agreements are a, quote,
18 "crude attempt to circumvent the TSR's requirement that
19 to initiate a robocall," somebody didn't proofread, "the
20 specific seller obtained consent directly from a consumer
21 and only after providing clear and conspicuous
22 disclosure."

23 So these allegations go to what happens once the
24 consumer's on one of your websites, correct?

25 MR. RAMSEY: Yes, then when we sell it to an

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

19

advertiser to --

THE COURT: Right, and they do not describe texts that a consumer may have received from what we've been calling publishers that drive the consumer to your site where these bad things allegedly happened to them.

MR. RAMSEY: There would be calls from advertisers after they're on our website.

THE COURT: Okay. So let me go back to Mr. Morgan. I have to say I'm kind of leaning towards defendants on this particular issue. Can you point me to the sort of -- is there any portion of the FTC complaint that we haven't yet discussed that you think gives you a better hook for your argument?

MR. MORGAN: Certainly, Your Honor, if you look at paragraph 33 --

THE COURT: Hold on.

(pause in proceeding)

THE COURT: All right, I'm with you.

MR. MORGAN: So it states, Defendants have funneled consumers to their website by disseminating their own ads and by paying affiliate markers or publishers to disseminate ads containing the hyperlinks to the Fluent generation sites. Defendants know or should know that the publishers often use ads that are

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

20

facially deceptive and make use of other abusive tactics such as text message spamming\, and browser hijacking. You know, text message spamming is unwanted text messages. Browser hijacking is something that's very similar to what our clients experienced where they would click a link, and the browser would automatically divert them through a number of hops to the defendants' websites.

It then goes on, Nevertheless, defendants have failed to prevent the publishers from engaging in this illicit conduct. In fact, sales executives have excused and even encouraged this conduct. The FTC makes these allegations based on their investigation and I presume reviewing documents and being aware of the specific things such as what's referenced later on about the Fluent executive, you know, editing the text messages and sending them back to the publisher.

So while I agree the FTC investigation may have focused on the calls that resulted from this entire scheme, it certainly, there's certainly relevant information here that's connected to how these individuals first came to Fluent's website were, you know, given our information and then that information was sold and called based on the third parties. So we view

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

21

it as one big chain and what we're after here is, you know, the text messages that were ultimately sent and who sent them and the knowledge of Fluent, right, because that goes to whether it was a willful and knowing violation under the TCPA. And these documents suggest that they certainly, you know, were aware and encouraged this conduct, and that's the information that we're seeking.

Fluent originally told us that none of this exists, then we find this, you know, and that essentially we're after the relevant information about the text messages, what they knew, when they knew it, how they knew it, what they were doing, what they were encouraging. I mean certainly our plaintiffs we recently notified received messages that the third-party publishers that the defendants identified in the recent videos, right, based on the Court's order, they identified a few publishers associated with messages that our plaintiffs received that are referenced in the FTC complaint, such as HasTraffic. So certainly communications with HasTraffic, information regarding HasTraffic, you know, all of that's going to be relevant to help us identify if that publisher was sending these messages.

1 PROCEEDINGS 22

2 THE COURT: Okay, Mr. Ramsey, paragraph 33
3 certainly seems a lot closer to the mark. Let me ask you
4 a couple of background question. How many documents or
5 pages or however you keep track did the defendants
6 produce to the FTC?

7 MR. RAMSEY: I don't know the precise number of
8 documents and pages. It's a terabyte of data.

9 THE COURT: Okay.

10 MR. RAMSEY: It's a huge, huge, huge quantity.
11 Now, a lot of the data produced had to do with, you know,
12 call logs and things of that nature, so I don't want to
13 suggest that there's a terabyte of emails, but a lot of
14 data.

15 THE COURT: And when you produce documents to
16 the FTC, how was it organized? For example, did the FTC
17 ask and did you respond to a document demand saying
18 you've produced all documents relevant to paragraph 43,
19 33 excuse me, which might make our job a lot easier.

20 MR. RAMSEY: Sure, so no, there was a CID that
21 came during the investigatory phase prior to the filing
22 of the complaint --

23 THE COURT: Right.

24 MR. RAMSEY: -- the filing of the complaint was
25 immediately followed by a consent order. So that was all

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

23

negotiated, you know, as part of that process --

THE COURT: So when the CID arrived, there was no complaint yet.

MR. RAMSEY: Yeah, it was long before. And when the complaint gets filed, then there's an immediate consent order, that's all negotiated, you know, beforehand. So there wasn't any discovery post complaint. I have reviewed the CID, and there are not requests, again, what we're talking about here.

THE COURT: So I guess what plaintiffs' counsel are now thinking to themselves is why should we believe Mr. Ramsey when he says he's reviewed the CID and that there's nothing relevant there? I'm sure they don't mean it in their heads personally, but, you know, you're opponents, and that's how lawyers think about their opponent.

MR. RAMSEY: Sure, I get that. I guess I would say go look at the FTC complaint which is 55 pages and 138 paragraphs, and they found sort of one not even complete sentence clause in the middle of paragraph 33 which comes in a section that deals with nothing about unwanted text messages. And they think that the investigation was about unwanted text messages driving traffic to Fluent's website. So I mean just look at the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

24

complaint itself.

Now, I view this as a, I sort of come at it from a slightly different angle which is if they propounded a request tomorrow that said produce all emails, you know, about publishers that sent text messages or produce all emails about publishers that sent unwanted text messages, I don't know what Your Honor would do, but I think that would be overbroad and unduly burdensome. That is not narrowed to any publisher in the case. It's not narrowed to even a group of publishers. And that is effectively what they're saying.

I'm telling you that there's nothing, but then to say, well --

(interposing)

THE COURT: But as you say --

MR. RAMSEY: -- anything about text.

THE COURT: You're telling me there's nothing, but you also tell me there's a terabyte of data. So I doubt you've read every email that was produced to the FTC.

MR. RAMSEY: I would not say that. We have done quite a bit of investigation into what was produced. I didn't just come in saying looking at the FTC complaint.

THE COURT: So --

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

25

MR. RAMSEY: And that's why - sorry, go ahead.

THE COURT: Suppose my order had been somewhat differently worded and had directed you to produce all documents previously produced to the FTC relevant to the allegations in paragraph 33 of the complaint. Would that have produced nothing as well?

MR. RAMSEY: I would need to look - no, 33 is much broader than text messages. 33 is defendants have funneled consumers to their website by disseminating their own ads and by paying publishers to (indiscernible) ads that contain hyperlinks. I mean certainly we produced lots of information --

THE COURT: Defendants know or should know that their publishers often use ads that are facially deceptive and make use of other abusive tactics such as text message spamming and browser hijacking. Did you produce any documents to the FTC concerning those abusive tactics employed by your publishers?

MR. RAMSEY: Narrowed to text message spamming, my understanding is no. I also don't, I know Mr. Morgan wants to say the text message spamming is unwanted texts, but that is, that's not what that is. That means mass, you know, sending thousands of messages at a time.

THE COURT: Well, it could encompass sending

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

26

messages to people who don't want them, but I take your point that it doesn't necessarily.

MR. RAMSEY: Correct. And what - sorry.

THE COURT: Go ahead.

MR. RAMSEY: I was going to say if someone can receive a message and then get the spam message, you know, sent massively, they may later claim it's unwanted. I mean but none of that was investigated. Nothing about whether consumers wanted or didn't want these messages was investigated.

THE COURT: In the same paragraph of my November 22 order, I required the defendants to produce documents previously produced to the New York Attorney General with the same limitation, which is, quote, "concerning the issues of consumers being improperly driven to defendants' websites directly or indirectly by unwanted text messages." Were any of portions of the AG production produced in this case?

MR. RAMSEY: No. The AG investigation was even farther afield than the FTC investigation. It involved an allegation that Fluent was hired by political organizations to accumulate comments on proposed rulemaking and that Fluent simply made up comments. Had nothing to do with text messages, had nothing to do even

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

27

with Fluent's websites.

THE COURT: All right, well, I'm not sure, counsel, that I have a basis here for holding anybody in contempt or, indeed, assessing any of the other sanctions available to me under Rule 37(b). What is the order that plaintiffs would have me enter here and what's the basis for it, Mr. Morgan?

MR. MORGAN: So, Your Honor, I would ask that the Court possibly modify then its order compelling the defendants to produce documents with something somewhat broader so that we don't have this, you know, parsing words on what is and what is not relevant. Perhaps, you know, documents that refer to text messages that, you know, in any way that point --

THE COURT: Text messages sent by publishers?

MR. MORGAN: Text messages sent by, yeah, publishers or third parties. And I'm hesitant because I know that Fluent says it's not on their behalf and they don't authorize it. But I think that documents that relate to text messages to get to those Fluent websites, right, so the before activity, not, you know, you're at Fluent's site and then they sell your data to other people that call and text you. This is all, you know, pre website activity or activity that brings you to a

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

28

website.

THE COURT: If I were to order the defendants to produce as a larger subset of their FTC production, all documents produced to the FTC referring to text messages sent by publishers or third parties to drive consumers to Fluent's website, that's what you're going for here?

MR. MORGAN: I probably wouldn't say to drive consumers to the websites because I'm sure the defendants will take some issue with that. You know, I would prefer it being a little broader to --

THE COURT: Well, okay --

MR. MORGAN: -- that relate to text messages.

THE COURT: So --

(interposing)

MR. MORGAN: -- what's going to happen is, oh, these didn't - if you look at paragraph 39, this is, again, they recruit and pay publishers to attract consumers to their websites and, again, and note that they do so with text messaging, I mean what we're really after, right, is the documents showing what they knew, when they knew it, and specifically the documents with respect to the editing of the text messages by the executives. It looks like there's probably some internal friction between the compliance department and the sales

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

29

department. So I suspect there's likely those types of documents because the FTC references --

THE COURT: But that's, again, that's not your issue --

MR. MORGAN: Well, no --

(interposing)

THE COURT: Wait, wait, wait. If Fluent executives are working with these publishers and third parties to edit the text messages that these publishers and third parties are sending out to drive or attract or herd consumers to the Fluent website, that goes to the FTC's issues, doesn't it, whether the content of these communications was misleading, how do I draft an order that makes it, that's broad enough so that if there's anything out there in the FTC production that's genuinely relevant to your case, you get it, but that isn't so broad that it gets you just a boatload of material going to content which is not your issue rather than going to the sending of these messages to folks that are not authorized to send any messages to at all which is, if I understand it, your issue?

MR. MORGAN: And I guess the two - I think it's really difficult to divorce the two issues from one another, right, because our case is about the publishers

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

30

who are sending text messages to people that didn't consent. The same text messages that we're talking about, right, had deceptive content in them. Communications about, you know, to a publisher saying, hey, the content of this message that you're sending to consumers is a little bit too aggressive, you need to tone it down would certainly for us be relevant because it would show, you know, Fluent to where the publisher is sending the messages in the first place. It would allow us to - the content of the messages I think is relevant here because it may allow us to identify which publishers are associated with which messages. Right? We have copies of our clients' messages, and if we can compare those to the contents of the messages involved with certain publishes, that may be a key for us to being able to actually identify. You know, matching what I did in the letter, right, putting them up side by side, there's a lot of very, you know, similarities here, and it's difficult I think to really divorce issues of just, hey, you shouldn't be sending text messages versus, you shouldn't be sending text messages and, oh, by the way, you know, the content in them is over the top. Or if we're ignoring the unwanted text message issue anyway and we're going to turn a blind eye to it, then there really

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

31

may not be many, you know, correspondence pushing back on the idea of sending text messages. Right? It may be that we're going to help you edit them or, you know, this is what we want to see in the messages without anything about them being unwanted or, you know, policies and procedures or anything like that.

So that's my kind of overarching concern about all this is that it's very difficult for us to kind of pull the things apart and say what bucket, you know, something fits into and what bucket it doesn't.

THE COURT: Right. On the other hand, opposing counsel tells me and has told you that he has adequately reviewed the FTC production and that there's nothing in there that concerns the issue of consumers, and this is the way I put it last time, being improperly driven to defendant's website directly or indirectly by unwanted text messages.

Now, if there was an email that went from Fluent to one of these publishers saying, by the way, you know, please make sure that all of your text messages, now that we've toned them down some, only go to people who haven't opted out, people you're entitled to send these to, that would've been produced, should've been produced already. Conversely, if there's an email which says, yeah, don't

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

32

tell me who you're sending these to because I don't want to know, that would've or at least should've been produced already. But if I give you every email between Fluent and one of its publishers concerning the publisher text message, I think that's going to be overbroad because that's going to get you ninety-nine, maybe a hundred percent content related communication.

And as to that, your relevance hook is - I mean I understand your relevance hook. Your best relevance hook is, well, at least it shows that Fluent knew who these publishers were and knew that they were sending these emails, these text messages out. I'm not sure that's enough of a relevance hook to get you everything that the FTC got. I'm just - I think you may have to do this another way, counsel.

You can, of course, you've got time left in your discovery schedule. You can send your own follow-on discovery request, Rule 34 document request to the defendants. I'm sure you can come up with better definitions and better limitations and better ways of getting at this than the ones I thought of off the top of my head in the last half hour. But I'm not sure I have any relief for you today on this issue with respect to the prior order as applied to the FTC production.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

33

MR. MORGAN: Thank you, Your Honor.

THE COURT: All right, so I think that's it. Is there anything else? I'll put down on paper my oral ruling with respect to the witness information that has to be provided by the end of the week. Your Honor, Mr. Ramsey, maybe I'll just order you to give them the name of the anonymous executive by the end of the week as well, that'll save time, or you can call him up after we get off the line today and tell him.

All right, so nothing further from the plaintiff?

MR. MORGAN: There are a few other issues, Your Honor.

THE COURT: Go ahead, sir.

MR. MORGAN: So the publisher agreements, we were given documents that just appear to be template documents. It's our understanding that there should be, you know, kind of works like a master services type agreement where you would have insertion orders or additional documents attached. None of them are executed or signed or anything like that. So I question whether we actually have the agreements between the publishers that have been identified or not.

THE COURT: Did you - did I miss this? Was this

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

34

in your letter on January 2?

MR. MORGAN: So it was in our follow-up letter. We noted at the bottom of our first letter that there may be some initial issues because the defendants did not produce documents within the time period that the Court set. They ended up subsequently producing them, and we believe that that production was inadequate and not in line with the Court's order.

THE COURT: You're right, it's in your January 8 letter. All right, and have you had any further communication with defendants on this issue?

MR. MORGAN: I believe we followed up but did not yet receive a response about whether there's any additional documents.

THE COURT: Mr. Ramsey.

MR. RAMSEY: They sent an email last Thursday before the holiday weekend, and I am working on it. Whether there's IO's or not to produce. So I --

THE COURT: Whether what?

MR. RAMSEY: So we produced the contracts, what you might refer to as the master services agreement, but the question is whether there's effectively purchase orders underneath it.

THE COURT: Right.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

35

MR. RAMSEY: So I need to go look for that. And the last we heard - we heard from them on Thursday, last Thursday. I don't have an answer yet, unfortunately.

THE COURT: You agree that those additional documents come within the scope of what you're required to produce, correct? So if you got them, you have to produce them.

MR. RAMSEY: I might quibble with that a bit, but yes, we have no problem producing them.

THE COURT: All right. Do you need more than this Friday to figure that out and produce them if you've got them?

MR. RAMSEY: The search for them is underway. I don't think it will take longer than this Friday. It may spill into the next, you know, Monday or Tuesday, but I will produce them as soon as I have them.

THE COURT: All right, preferably by this Friday.

MR. RAMSEY: All right.

THE COURT: Actually, today's already Tuesday. I'll give you till next Tuesday. Everything I said I would give you until Friday on, I'm going to give you till next Tuesday on because it's a short week. Anything else, Mr. Morgan?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

36

MR. MORGAN: The last issue, Your Honor, is we were given a lot of documents related to consumer complaints about text messages, and I believe the Court's order was a little bit broader. That's also communications with publishers regarding these complaints. We received no communications, email, other correspondence with any publishers regarding any consumer complaints about text messages.

THE COURT: I think you're referring to paragraph 6 of my November 22 order, is that right?

MR. MORGAN: I believe that is correct.

THE COURT: That's the paragraph that ordered defendants to produce for attorney's eyes only, I'll read it to you, "all non-privileged documents reflecting complaints made during the four-year period preceding the filing of this action by or on behalf of consumers concerning unwanted text messages that directly or indirectly drove traffic to the defendants' website as well as follow-up correspondence between the complainants and defendants or between defendants and the relevant publishers and documents reflecting resulting settlements, whether formal or informal."

MR. MORGAN: That's correct, Your Honor.

THE COURT: And what're you missing exactly?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

37

MR. MORGAN: We have not seen any correspondence between defendants and any publishers. And it's unclear the response we received, it's unclear if documents were being withheld or, you know, I just want to kind of close the loop on that issue.

THE COURT: Mr. Ramsey.

MR. RAMSEY: Sure, so the way the files are kept are by complaint, and we went and pulled the folders for those. I do believe there are some communications with publishers produced. Most of these complaints are not ever really addressed. They are, looks like somebody copied something from a website and sent it to us. In any event, I will continue to look for them, but my understanding is that we produced, you know, we got a complaint from so and so, here's the folder we keep on it.

THE COURT: And that folder would include any correspondence between your clients and the publishers?

MR. RAMSEY: That is - that is my understanding, and so that's what we could produce, but I will go, I said that I would go confirm this with Mr. Morgan on the phone and so I will do that.

THE COURT: And, Mr. Morgan, at some point, I assume you're going to send a 30(b)(6) deposition notice

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

38

out, and one of your topics may well be give me someone who's knowledgeable about what happens when a complaint comes in and how you follow up and where you keep all the relevant documents, right?

MR. MORGAN: Certainly, Your Honor. Yeah, we're hopeful to get some documents first and then conduct a 30(b)(6), but, you know, we may advance that a little quicker.

THE COURT: All right. Is that the end of your list, Mr. Morgan?

MR. MORGAN: Yes, Your Honor.

THE COURT: All right, well, then I will issue a short order covering the points that we have covered today and giving the defendants until a week from today to produce the information or accept the subpoenas or do the other things that we discussed, but I'm not going to be giving you any Rule 37(b) relief with respect to the FTC production. Thank you very much, we will be adjourned.

MR. MORGAN: Thank you, Your Honor.

MR. RAMSEY: Thank you, Your Honor.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of PEPPERS, et al. v. FLUENT, et al., Docket #21cv6581, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: February 18, 2024